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No. 84-844.

In the Supreme Court of the United States.

OCTOBER TERM, 1984.

HOME PLACEMENT SERVICE, INC.,
PETITIONER,

v.

PROVIDENCE JOURNAL COMPANY,
RESPONDENT.

Brief in Opposition to a Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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Questions Presented.

Respondent Providence Journal Company[1] respectfully urges that the questions presented are more properly framed as follows:

1. Does Rule 63 of the Federal Rules of Civil Procedure require a new trial on damages where the parties stipulated at trial the evidence for determining damages?

2. Should this Court grant certiorari to review an interlocutory order?

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[1] In compliance with Rule 28.1 of the Supreme Court Rules, respondent states that its non-wholly owned subsidiaries, and its affiliates, are: Mobile-Pensacola Broadcasters, Inc., Bristol County Cellular Radio, Inc., Carolinas RCC, Inc., Aircall, Inc., CARS of Burlington, Inc., CARS of the Carolinas, Inc., CARS of Hickory, Inc., CARS of Salisbury-Concord, Inc., CARS of the Skyland, Inc., CARS of the Triad, Inc., CARS of the Triangle, Inc., Dial Page of the Triad, Inc., PACE, Inc., Two Way Radio of Carolina, Inc., Radio Paging Services, Camden Mobile Communications, Inc., CARS of Anderson, Inc., CARS of Columbia, Inc., CARS of Piedmont, Inc., CARS of York, Inc., Evans Communications, Inc., Evans Telephone Answering Service, Rock Hill Mobile Communications, CARS of Savannah, Inc., Georgia Paging Company, Dial Page of Tri-Cities, Inc., Rhode Island Cellular Radio, Inc., Colony Microband of Massachusetts, Inc., Colony Microband of Rhode Island, Inc., Dynamic Cablevision of Florida, Inc., Greater Fall River Cable TV, Inc., Vision-Cable Company of Rhode Island, Inc., Copley/Colony, Inc., Copley/Colony Cablevision of Costa Mesa, Inc., Copley/Colony Cablevision of Cypress, Inc., Copley/Colony Cablevision of Lomita, Inc., Copley/Colony Cablevision of Los Angeles County, Inc., Copley/Colony Cablevision of Orange County, Inc., Copley/Colony Harbor Cablevision, Inc., Compucolor International, Mountain State Broadcasting, PH Associates, Venice Properties, Ltd.

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Statement of the Case.

This case, brought under Sections 1 and 2 of the Sherman Act, by petitioner Home Placement Service, Inc. and others,[2] is a sequel to an earlier case involving similar issues, *Homefinders of America, Inc. v. Providence Journal Co.*, 621 F.2d 441 (1st Cir. 1980). In *Homefinders*, the Court of Appeals affirmed the District Court's dismissal of the action,[3] holding that defendant incurred no Sherman Act liability for refusing advertising proffered by Homefinders' franchisee for so-called rental referrals, where the ads were deceptive.

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[2] Plaintiff Joseph P. Muschiano is not a party to this petition.
[3] 471 F.Supp. 416 (D.R.I. 1979).

In this action, the parties stipulated[4] that the record in the prior *Homefinders* case would be made a part of the record. After hearing additional testimony, the District Court (Boyle, J. who had also heard the *Homefinders* case) in an unreported decision dismissed the action, holding that the respective Homefinders and Home Placement "schemes . . . [were] . . . not distinguishable." On appeal, the First Circuit reversed, holding that Home Placement's advertisements were not deceptive and that plaintiffs had established violations of Sections 1 and 2 of the Sherman Act. The matter was remanded "to determine the appropriate form of injunctive relief, if any is needed, and the amount owing in damages and attorney's fees." *Home Placement Service, Inc. v. Providence Journal Co.*, 682 F.2d 274, 281 (1st Cir. 1982), *cert. denied*, 103 S. Ct. 1279 (1983).

In remanding, the Court of Appeals suggested that the case be referred to another district judge. Id. at 281. District Judge Selya, to whom the case was assigned, ruled[5] that there would be no new trial on the question of damages and that he would determine damages on the stipulated record as supplemented.

Plaintiffs sought clarification by the Court of Appeals on motion. The Court of Appeals responded[6] that: ". . . (1) The district court was entirely correct in observing that we did not order a new trial, (2) . . . was essentially correct in considering plaintiffs 'waived' any damage evidence that could not reasonably have been discovered and was not offered . . .," but permitted plaintiff to proffer any evidence acquired after the December, 1980 trial. Following plaintiffs' offer of proof on after-acquired evidence, Judge Selya ruled that an injunction should issue, held that there was insufficient evidence to

[4] The text of the stipulation is set forth in n.1 on pp. 2-3 of the appendix to the petition herein, hereinafter "App.".

[5] Supplemental Appendix, 1-2.

[6] Supplemental Appendix, 3-4.

support plaintiffs' damage claim, and awarded plaintiffs nominal damages of $1.00, trebled.[7] Attorneys' fees were awarded to plaintiffs' counsel and a motion to recuse Judge Selya was heard and denied.

Plaintiffs appealed the damage decision and the denial of the motion to recuse. Both parties appealed the attorneys' fee award. Neither party appealed the injunction.

On this appeal, plaintiffs for the first time argued that Rule 63 of the Federal Rules of Civil Procedure mandated a full new trial on the issue of damages after remand. The Court of Appeals reaffirmed for the second time that it was proper for the district court to rule on the damage issue on the stipulated record (as supplemented by after-acquired evidence), but reversed on the recusal issue. *Home Placement Service, Inc. v. Providence Journal Co.*, 739 F.2d 671 (1st Cir. 1984); App. 1-16. The case was thereupon remanded for a determination by another district judge of both the attorneys' fees issue and the damages issue. Thereafter, plaintiffs filed a motion with the Court of Appeals for rehearing, which was denied (A. 23-24).

The First Circuit said: "We reaffirm our ruling that Rule 63 does not apply" (A. 24).

Reasons for Denying the Petition.

Summary of Argument.

I. Rule 63 of the Federal Rules of Civil Procedure does not apply to the procedural facts of this case to compel a full new trial on the issue of damages and the First Circuit was correct in so holding. The First Circuit decision on this issue is not in conflict with the decisions of other circuit applying Rule 63 in post-trial situations in the trial courts.

II. The petition for certiorari herein seeks review of an interlocutory order remanding the case to the District Court.

[7] *Home Placement Service, Inc. v. Providence Journal Co.*, 573 F.Supp. 1423 (D.R.I. 1983).

There being no compelling necessity for plenary review by this Court at this time, the petition should be denied.

Argument.

I. Rule 63 of the Federal Rules of Civil Procedure Does Not Apply, and Should Not be Applied, in this Case to Compel a Plenary Evidentiary Trial on the Damages Issue, After Remand.

Petitioner's belated assertion of Rule 63[8] is an attempt to secure a second bite at the apple, a plenary new trial on damages, and is wholly without foundation. The Court of Appeals for the First Circuit held, after its 1982 remand,[9] on petitioner's motion for clarification, that they had not ordered a new trial and that: "The [District] Court was essentially correct in considering plaintiffs 'waived' any damage evidence that could reasonably have been discovered and was not offered. Basically, *plaintiffs must stand on the record*...." [Emphasis added.] *Home Placement*, 739 F.2d at 673 (App. 4, Supp. App. 3).

Following a decision unfavorable to petitioners on the damage issue ($1.00 damages, trebled to $3.00), petitioners on appeal for the first time contended that Rule 63 compelled a full new trial.

The Court of Appeals was clearly correct in saying that:

> The rule [63] simply does not apply to this situation. [Footnote quoting Rule 63 omitted.] Plaintiffs voluntarily entered into a stipulation as to what would constitute the evidence in this case for purposes of determining damages.... We rule, as a matter of law, that under the unique circumstances of this case, there would be no abuse of discretion in not granting a new trial on damages....

Id. at 677-8. (App. 13).

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[8] *Home Placement*, 739 F.2d at 677; App. 13.

[9] *Home Placement*, 682 F.2d 274.

Thereafter, when petitioners requested reconsideration of this ruling, the First Circuit reaffirmed its ruling that Rule 63 did not apply (App. 24).

By its terms, Rule 63 is not applicable to the situation in this case. It is clearly designed to permit *nisi prius* judges to perform essentially ministerial acts after trial and after verdict where the trial judge has died, or becomes sick, or has been otherwise disabled. Petitioner here seeks to leverage the provisions of this rule into a basis for granting a motion to reopen its case.

Respondent has found no decisions applying Rule 63 to compel a full new trial after remand. None of the cases cited in the petition (Pet., 6-9) involved a remand with a direction for determination of particular issues by another judge. The cited decisions regarding Rule 63 all involved post-trial determinations in the trial courts. There is thus no "conflict in the circuits" as petitioner argues (Pet., 9).

Moreover, the parties here stipulated at trial that the Homefinders record be part of the record herein [*Home Placement*, 739 F.2d at 672, n. 1 (App. 2-3)]. After the stipulation, without proffering additional evidence on damages (comparability), petitioner rested its case (App. 3-4; Supp. App. 3). Petitioner's invocation of Rule 63, in the wrong context, is simply an attempt to reopen at a very late stage. The attempt should be disallowed.

The sole question remaining for the trial judge to whom the case is now remanded is the *sufficiency* of the damage evidence as a matter of law: "Since there has to be a remand, we think it preferable for the district court to first decide the legal sufficiency question and then, if necessary, determine the amount of damages, if any." *Home Placement*, 739 F.2d at 679 (App. 15).

Contrary to petitioner's argument at pages 8-9 of its petition, this issue does not involve the credibility of witnesses, but has solely to do with the sufficiency of the record evi-

dence.[10] The fact that there has been a second remand to a third trial judge by virtue of the First Circuit decision on recusal, does not change the result on petitioner's attempt to reopen. The third trial judge (to whom the case now stands remanded) is in the same position in determining the legal sufficiency of the record as the recused judge. Indeed, he is essentially in the same position as the first trial judge, had the case originally gone back to him for determination of damages. The stipulation limited plaintiff-petitioner's evidence on damages *to the existing record.* Clearly, the First Circuit was correct in so ruling (App. 13):

> . . . We must assume not only that they [plaintiffs] knew what they were doing, but that they had a reason for doing it. Stipulations entered into between experienced and able counsel, such as we have here, are not to be shrugged off lightly. Moreover, even if the rule could nullify the stipulation, which we think it could not, a new trial is not mandatory under the rule; it is left up to the discretion of the successor judge. We rule, as a matter of law, that under the unique circumstances of this case, there would be no abuse of discretion in not granting a new trial on damages. . . .

Home Placement, 739 F.2d at 678 (App. 13).

II. The Petition Should Be Denied because There Is No Compelling Necessity for Interlocutory Review.

The petition requests review of a ruling and mandate of the First Circuit remanding the instant action to the district court. Petitioner has failed to demonstrate any compelling

[10] The damage question involves plaintiff's attempt to use the "yardstick" approach in comparing plaintiff's business to an allegedly similar business. The record consists only of plaintiff's evidence; the defendants never proffered any countervailing evidence, arguing instead that plaintiff's evidence was purely speculative and inadequate. Thus, the damage issue is in a posture to be determined by a judge simply by reviewing the record and deciding whether the uncontradicted evidence is sufficient to meet the minimum standards of proof of damages in an antitrust case.

reason for review of this interlocutory order. As pointed out above at page 5, there is no "conflict" between this essentially procedural ruling and decisions in other circuits on Rule 63.

Absent finality and a compelling reason, this Court should deny certiorari. As long ago stated in *American Construction Co. v. Jacksonville T. & K. R. Co.*, 148 U.S. 372, 384 (1893): "this court should not issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *See also Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967) ("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court"); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 584-585 (1952); *Cobbledick v. United States*, 309 U.S. 323, 324-325 (1939). *Cf. Beacon Theatres Inc. v. Westover*, 359 U.S. 500, 501 (1959).

Petitioner herein has demonstrated no exceptional reason to justify interlocutory review.

Conclusion.

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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